Supreme Court, U. S.
FILED
JUN 9 1975
CLERK

No. 74-1304

In the Supreme Court of the United States

OCTOBER TERM, 1974

STATE OF NEVADA EX REL. ROLAND D. WESTERGARD, STATE ENGINEER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, the State of Nevada, seeks review of the same decision by the United States Court of Appeals for the Ninth Circuit that is the subject of the pending petition in *Cappaert* v. *United States,* No. 74-1107.[1] We are serving on petitioner a copy of our brief in opposition in *Cappaert*.

The essential facts of the case are as follows. In 1952, by Presidential Proclamation "a remarkable underground pool known as Devil's Hole * * *" and the 40 acres surrounding it were withdrawn from the public domain and established as a detached portion of Death Valley National Monument. The pool is the sole natural habitat

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[1]On May 19, 1975, the Court granted the motion of petitioners in No. 74-1107 to defer consideration of their petition.

of a "peculiar race of desert fish * * * found nowhere else in the world" known as pupfish (Cyprinodon diabolis).[2]

In 1968, the Cappaerts, who had acquired nearby land, began substantial groundwater pumping to support a new ranching venture.[3] The water pumped from the Cappaerts' wells is from the same underground formation that supplies water to Devil's Hole; consequently, the water level in Devils Hole began to recede and the pupfish population declined precipitously.

In 1971, after an unsuccessful protest to the State Engineer (Pet. App. A, xv) against the issuance of pumping permits to the Cappaerts, the United States initiated this action to enjoin the Cappaerts from exercising their permits in a manner that would threaten the fish life of the pool. The State of Nevada, which was permitted to intervene as a defendant, argued, *inter alia*, that (1) the United States had no water rights to the underground water involved in this suit, (2) the McCarran Amendment (66 Stat. 560, 43 U.S.C. 666) divested the federal courts of jurisdiction to entertain suits concerning water rights claimed by the United States, and (3) the decision by the Nevada State Engineer to grant permits to the Cappaerts to pump groundwater was *res judicata* and barred this action.

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[2]See our brief in *Cappaert*, at p. 2. The quotations are from the Presidential Proclamation, which is reproduced in the separate appendix to the petition in *Cappaert*, at App. C, C-1 to C-3.

[3]The Cappaerts' land acquisitions are outlined in their petition (No. 74-1107); they acquired much of the land from the United States after the creation of the Devil's Hole National Monument. The court of appeals properly rejected their argument that the acquisitions from the United States estopped the United States from contesting their use of water and gave them the right to pump water without limitation (Pet. App. A (No. 74-1304), xi-xii).

The district court, finding that the United States held a water right superior to that of the Cappaerts,[4] entered a preliminary injunction directing the Cappaerts to curtail their pumping sufficiently to assure an adequate water level in Devil's Hole for the preservation of the fish. On appeal, the court of appeals, with the concurrence of the parties, remanded the case to the district court for entry of a final order. After entry of the order making the injunction permanent, the court of appeals affirmed (Pet. App. A), but directed the district court to retain continuing jurisdiction to determine the precise water level required to ensure survival of the fish.

1. Petitioner contends that the decisions of the district court and court of appeals present novel and important questions of water law. However, as the opinion below demonstrates, and as we pointed out in our brief in opposition in *Cappaert*, there are no such questions at issue. It is well established that the United States may, by withdrawal of public lands, reserve such appurtenant unappropriated waters as are required to accomplish the purpose for which the lands are withdrawn. Such federal reserved water rights may be found in conjunction with the reservation of lands by Act of Congress or Executive Order and for any appropriate federal purpose. *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, 522-523; *Arizona* v. *California*, 373 U.S. 546, 597-601; *Winters* v. *United States*, 207 U.S. 564. A state water permit is not required to perfect this federal right. *Eagle County, supra,* 401 U.S. at

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[4]The courts below found that the Cappaerts' use of water for the ranch in question began in 1968 and that under Nevada law their water right had priority only over water rights established after that time. The courts found that the federal right dated from the establishment of the National Monument in 1952 (Pet. App. A, x-xi, xiii).

523; *Arizona* v. *California, supra*, 373 U.S. at 597-598; *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 447-448; *United States* v. *Walker River Irr. Dist.*, 104 F.2d 334, 336 (C.A. 9).

The district court and the court of appeals correctly found that in establishing Devil's Hole as a national monument, President Truman intended to preserve the pool, and that the effect of the reservation was thus to reserve the then unappropriated water rights necessary for this purpose. This case thus does not present the question framed by petitioner (Pet. 3), that is, whether *every* federal reservation of land formerly in the public domain reserves a water right. The only question is whether this reservation, concerned with preserving a unique pool of water and specimen of fish, reserved such a right.

Petitioner further contends (Pet. 6-7, 12-13) that the decision below departs from precedent in that the reserved water right at issue here was not based upon "need". The courts below found that the water at issue was needed to accomplish the purposes for which Devil's Hole was reserved, that is, the preservation of the unique fish that live in it (Pet. App. A, iv-viii, xiii). Thus the existence of a federal water right not based on "need" is not an issue presented by this case.

2. Petitioner apparently asserts here (Pet. 14-19), as it did in the court of appeals, that the McCarran Amendment and this Court's decision in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527, divest the United States district courts of the jurisdiction granted by 28 U.S.C. 1345 to entertain actions brought by the United States to establish and protect its water rights. The court of appeals correctly rejected this contention (Pet. App. A, xiii-xiv),

holding that the McCarran Amendment is simply a waiver of sovereign immunity permitting the United States to be joined as a defendant in general water adjudications, whether in state or federal courts, but does not divest federal district courts of jurisdiction they otherwise have.

Moreover, the instant case is not a general water adjudication, but an action by one water user (the United States) to enjoin an encroaching use by another (the Cappaerts). As such it is not covered by the McCarran Amendment. See *Dugan* v. *Rank*, 372 U.S. 609, 617-618; see also Pet. App. A, xv-xvii.[5]

3. Petitioner finally argues (Pet. 4-5, 14-19) that the court of appeals should have found the United States' action barred by the doctrine of *res judicata* because the National Park Service, in a proceeding before the State Engineer, protested the Cappaerts' application for a state permit to pump certain wells.[6] The court of appeals properly rejected that contention (Pet. App. A, xv-xvi).

The proceeding before the State Engineer was on an application by the Cappaerts for a permit to pump certain quantities of water from their wells. The United States

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[5]We note in this respect that the Court has granted writs of certiorari in *Colorado River Water Conservation District, et al.* v. *United States*, No. 74-940, certiorari granted April 28, 1975, and *Mary Akin, et al.* v. *United States*, No. 74-949, certiorari granted April 28, 1975. Those cases are concerned with the question of abstention by a federal court in a general stream adjudication. They do not concern the role of the federal court in an injunction suit between two parties nor the substantive rights at issue here. Accordingly, the grant of certiorari in those cases does not call for review here.

[6]Petitioner incorrectly states that the United States was represented at the state protest hearing "through counsel from the Solicitor-General's office" (Pet. 4). In fact, as the court below correctly noted (Pet. App. A, xv), the protest was made by a field solicitor of the United States Department of the Interior.

was not made a party to the proceeding, but the Park Service presented evidence against the permits, showing that studies were being undertaken to determine the effect of additional pumping on the water level at Devil's Hole and that no additional pumping permits should be issued pending completion of the study (*ibid.*; see also R. 353-438).[7] The State Engineer declined to delay issuing the permits. In so doing he stated that it had not been shown that the additional pumping would unreasonably lower the water table or be contrary to the public interest, which the Engineer defined in terms of local economic development (R. 434, 435-436). The Engineer found that "no record of a water right on Devil's Hole" had been presented to him (R. 434) and for purposes of his decision he assumed there was no such right but issued the permits "subject to existing rights" (R. 436).

The court of appeals was correct in stating (Pet. App. A, xvi) that the State Engineer in this proceeding "did not have the authority to adjudicate the water rights of the United States." Moreover, the State Engineer did not purport to hear evidence on or to adjudicate those rights.[8] Six months later, when the actual result of the

[7]"R." refers to the record in the court of appeals. The transcript of the hearing before the State Engineer was made part of that record.

[8]Nevada law requires that a person obtain a permit from the Nevada State Engineer before withdrawing public waters, Nev. R.S. 533.325 and 534.050. Interested parties may file protests to such permit applications, Nev. R.S. 533.365, and permit applications may be rejected on the grounds that issuance of the permit is "detrimental to the public welfare," Nev. R.S. 533.370. But these state permits are issued subject to existing rights, Nev. R.S. 533.430, as was the case here. Adjudications of relative water rights among competing claimants fall under entirely separate and distinct provisions of the Nevada water laws, see Nev. R.S. 533.090-533.320, 534.100. The Cappaerts' state permit thus does not represent the result of an adjudication of water rights between the Cappaerts and the United States.

pumping was evident, the United States properly sought in the federal district court a judicial declaration of its rights and an injunction, not prohibiting all pumping by the Cappaerts, but limiting pumping to the extent necessary to preserve Devil's Hole.

4. *Amici* argue (Arizona Br. 10-18; Hawaii Br. 17-21) that this Court should grant review because the decision below unwarrantedly extends the federal reservation of water rights doctrine to groundwater.[9] However, the rationale in *Winters* v. *United States*, *supra*, and *Arizona* v. *California*, *supra*, is not based on the source of the water but on the fact that the United States, in withdrawing land from the public domain, should be held to have reserved needed water rights along with the land withdrawn.[10] All courts that have considered the question

[9]*Amici* also argue that President Truman did not have authority to reserve these water rights and that the government's case is barred by *res judicata*. These contentions are answered at pp. 3-4 and 5-7, *supra*. As to the first contention, see also our brief in *Cappaert*. Arizona also argues (Br. 10-18) that because it generally allows landowners to extract water without limitation, a reserved right to groundwater would be inconsistent with its laws. The short answer is that the reserved right is a matter of federal law. But we point out that while Arizona has tended to permit unlimited exploitation of groundwater by surface owners, other western states have not. See, for example, *City of Pasadena* v. *City of Alhambra*, 33 Cal. 2d 908, 207 P.2d 17 (Sup. Ct.). See also Nev. R.S. 534.020. And as Arizona points out, it too has moved towards treating groundwater similarly to surface water (Br. 10-12).

[10]Thus in *Arizona* v. *California* this Court stated (373 U.S. at 601):

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

have held the doctrine applicable to groundwater as well as other waters.

Thus in *State of Nevada ex rel. Shamberger* v. *United States*, 165 F. Supp. 600 (D. Nev.), the court held that in withdrawing from the public domain land for a Navy ammunition depot, the government tacitly reserved the right to operate wells on the depot sufficient to satisfy the needs of the depot and that a state permit to do so was not required.[11] Similarly in *Tweedy* v. *Texas Company*, 286 F. Supp. 383 (D. Mont.), the court found that the establishment of the Blackfeet Indian Reservation reserved underground waters to the same extent as surface waters.[12] We know of no case to the contrary. Thus the decision of the court of appeals in applying the reserved rights doctrine to groundwaters in no way established a novel interpretation of law or one conflicting with decisions of other courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[11]The Court of Appeals for the Ninth Circuit affirmed, 279 F.2d 699, on the ground that the United States had not consented to the suit against it.

[12]The court stated, 286 F. Supp. at 385:

> The *Winters* case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.